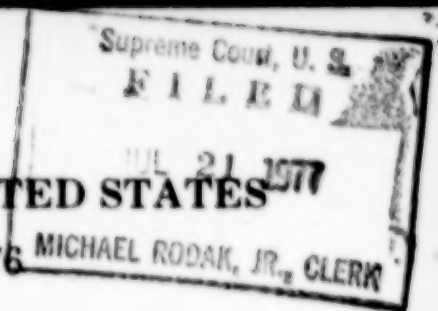


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976



* * *

NO. 76-1334

* * *

**DON BORDENKIRCHER, SUPERINTENDENT,
KENTUCKY STATE PENITENTIARY,**
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

**On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit**

* * *

**BRIEF OF AMICUS CURIAE IN
SUPPORT OF PETITIONER**

* * *

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INTEREST OF AMICUS CURIAE

The State of Texas files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of Texas have a vital interest in the question presented on the grant of certiorari in this case, that is, whether the use of an enhanced indictment by the state against a defendant

who refuses to plead guilty to the primary offense is unconstitutional.

For the reasons set forth below, the State of Texas will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above entitled matter.

The question now before this Honorable Court has been presented on substantially the same facts to the federal courts of the State of Texas. The United States Court of Appeals for the Fifth Circuit handed down an opinion on February 25, 1977, denying relief to a state prisoner who had alleged substantially the same facts as Respondent. *Montgomery v. Estelle*, No. 76-2636 (5th Cir. Feb. 25, 1977) (opinion attached as Appendix A). A Motion for Rehearing *En Banc* was denied and the mandate issued on April 14, 1977. On May 2, 1977, that court issued a new order *sua sponte* withdrawing the opinion, vacating the mandate, and setting *Montgomery v. Estelle* for oral argument. A copy of that order is attached as Appendix B.

In addition to *Montgomery*, there are several other cases pending in the federal courts in Texas on the same issue. Several hundred inmates of the Texas Department of Corrections will ultimately be affected by this Court's decision on this issue.

ARGUMENT AND AUTHORITIES

The use of habitual indictment during plea bargaining does not offend constitutional due process and equal protection.

The opinion of the United States Court of Appeals for the Sixth Circuit contends that the use of habitual indictment against one who asserts his right to trial is a vindictive tactic by the prosecutor. This theory is contra

to the holding of this Court in *Oyler v. Boles*, 368 U.S. 448 (1962). There, it was held that a state may exercise selectivity in the enforcement of its habitual criminal statutes without violating the Constitution unless the selectivity is based on an unjustifiable standard such as race, religion or similar arbitrary classification. *Oyler v. Boles*, 368 U.S. at 456.

The United States Court of Appeals for the Fifth Circuit has adopted this reasoning in dealing with this issue in previous cases. In *Martinez v. Estelle*, 527 F.2d 1330 (5th Cir. 1976), that court held that the defendant's life sentence was the result of trial strategy rather than prosecutorial vindictiveness. In denying relief, that court quoted from its earlier opinion in *Arechiga v. State of Texas*, 469 F.2d 646 (5th Cir. 1972):

It was Perales (the defendant), not the prosecuting attorney, who chose to proceed with the trial before a jury and forego the guarantee that the enhancement statute would not be invoked. Once petitioner rejected the state's offer, the state was free to proceed as it would in the trial of any other convicted felon and make full use of the enhancement statute. Under these circumstances we conclude that the state did not act vindictively and that petitioner's contention in this regard is therefore without merit.

Arechiga v. State of Texas, 469 F.2d 646, 647 (5th Cir. 1972).

See also *In Re Breen's Petition*, 237 F.Supp. 575 (S.D. Tex. 1964), *aff'd* 341 F.2d 96 (5th Cir. 1965), *cert. denied*, 386 U.S. 926 (1967).

In the case at bar Respondent Hayes had been twice before convicted of felonies. The law of the State of Kentucky, like that of the State of Texas, required a life sentence for one who is convicted of a felony after having been twice before convicted of felony offenses. The prosecutor made an offer of leniency to Respondent in exchange for a plea of guilty. Respondent instead chose to exercise his right to trial. If he had been found not guilty of the primary offense, he would have been free. If he had shown a defect in his earlier conviction, he would not have been subject to a life sentence. Respondent chose to reject the offer of a 5 year sentence and as a result of the conviction received a life sentence.

This presents no different situation in tactics than a choice by a defendant to forego a prosecutor's offer of lesser number of years than the maximum on any offense. Once that offer is rejected, the prosecutor may proceed as if there were no offer and seek the maximum punishment for the offense.

The prosecutor's discretion in offering a plea bargain is a basic element of the criminal justice system and is encouraged. *Santobello v. New York*, 404 U.S. 257 (1971). A holding that a prosecutor may never seek the maximum punishment after a defendant has rejected his offer would not only destroy the plea bargaining process but would bring into court every inmate who asserted his right to trial after being offered punishment less than the maximum in exchange for a plea of guilty.

In order to allow a sentence for a term of years less than life, the defendant cannot be convicted under an enhanced indictment. Therefore, he must be indicted without alleging any prior offense, or if the indictment alleges prior offenses, that portion must be dismissed. If

a plea of guilty is entered on an enhanced indictment, the only possible punishment is life imprisonment.

In order to attain a habitual indictment Texas, like most other jurisdictions, must present the grand jury proof of the commission and conviction of the prior offenses. The necessary proof is not generally available to the prosecution at the time the original indictment is presented. Further, if the prosecutor intends to offer a term of years in exchange for a plea of guilty the bargaining and plea itself can proceed more expeditiously if an indictment on the primary offense only is initially sought.

The state has a legitimate law enforcement interest in offering leniency in exchange for a plea of guilty. The first step toward rehabilitation is the affirmative action of a defendant coming forward and admitting his guilt. It has been held that:

Although a heavier sentence for one who has been convicted after trial and a lighter sentence for one who pleads guilty are in a sense two sides to the same coin, it is within proper bounds for the court to preserve some leeway so that it is able to extend the leniency in consideration of the cooperation and at least superficial penitence evidence by one who pleads guilty.

United States v. Wilson, 506 F.2d 1252, 1259-1260 (7th Cir. 1974).

It is often in the best interest of justice and society to offer the defendant a lesser sentence in exchange for a plea of guilty. A sentence less than life gives the defendant a better opportunity to begin rehabilitation. If the defendant has been twice before convicted, he faces a mandatory life sentence. When a defendant

makes an indication of penitence by expressing regrets for his action and desires to plead guilty, the prosecutor may show him leniency by securing a lesser indictment or dismissing the enhancement portion of the indictment.

The use of a life sentence as leverage for bargaining has been sanctioned. Mr. Justice Marshall, concurring in *Furman v. Georgia*, 408 U.S. 238 (1972), stated:

If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States v. Jackson*, 390 U.S. 570 (1968). Its elimination would do little to impair the state's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange for either charges of lesser offenses or recommendations of leniency.

408 U.S. at 355-56.

CONCLUSION

To uphold the decision of the Court of Appeals would auger the complete demise of plea bargaining. The criminal justice system, already stymied by an overly burdensome case load, would collapse under the pressure of trial on each case without plea bargaining. It is a pragmatism of today's society that a prosecutor must be allowed a certain amount of discretion in plea bargaining. To hold otherwise would be to ignore the possibility that some defendants are deserving of offers of leniency and would force the prosecutor to seek the maximum indictment without plea bargaining in every case. The mandate of the Fourteenth Amendment and

the Bill of Rights is not to prohibit the practice of accepting pleas to lesser included offenses under any circumstances. To render the actions of the prosecutor in the case at bar unconstitutional would be to put into jeopardy the human values and principles the Constitution was meant to preserve. Therefore, for all of the reasons outlined above, Amicus respectfully submits that this Honorable Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anita Ashton, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, now enter my appearance in

this cause on behalf of Amicus Curiae, State of Texas, and do hereby certify that three (3) copies of the foregoing Brief of Amicus Curiae in Support of Petitioner have been served by placing same in the United States mail, first class, postage prepaid, certified, return receipt requested, on this the ____ day of July, 1977, addressed as follows:

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APPENDIX A

MONTGOMERY v. ESTELLE

Robert Floyd MONTGOMERY,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas
Respondent-Appellee.

NO. 76-2636
Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1977.

Appeal from the United States District Court for the
Northern District of Texas.

Before GODBOLD, HILL and FAY, Circuit Judges.

PER CURIAM:

Robert Floyd Montgomery, a prisoner of the State of Texas, appeals from the district court's denial of his petition for the writ of habeas corpus, without an evidentiary hearing. We affirm.

Appellant was convicted in a Texas state court of selling narcotics, with two prior convictions alleged for enhancement of sentence. The jury found him guilty of the principal and enhancement counts, whereupon he received a mandatory life sentence as provided by

*Rule 18, 5 Cir.; see *Isbell Enterprises v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

former Art. 63 of the Texas Penal Code. On direct appeal the judgment was affirmed. *Montgomery v. State*, Tex.Cr.App.1974, 506 S.W.2d 623.

[1,2] Having exhausted his state remedies, appellant petitioned the United States District Court for habeas corpus relief. He alleged that the state prosecutor had deprived him of due process, equal protection, and Fifth and Sixth Amendment rights by prosecuting him as a multiple offender because he refused to plead guilty and forego his right to a jury trial. In support appellant cited *Hardin v. Briscoe*, 5 Cir., 1974, 504 F.2d 885. In that case, which presented the same issue, we held that the district court erred in dismissing the petition for failure to comply with an interlocutory order, and we remanded the case for a judicial determination of the merits of the claim.

In the case *sub judice*, the district court denied habeas relief on the merits, holding that appellant has no right to object to the prosecutor's utilization of the plea bargaining process. We so held, on similar facts, in *Breen v. Beto*, 5 Cir. 1965, 341 F.2d 96, cert. denied, 386 U.S. 926, 87 S.Ct. 867, 17 L.Ed.2d 798 (1967), affirming *In re Breen's Petition*, S.D. Tex.1964, 237 F.Supp. 575. We applied similar reasoning in *Martinez v. Estelle*, 5 Cir. 1976, 527 F.2d 1330, and *Arechiga v. State of Texas*, 5 Cir. 1972, 469 F.2d 646.

In the case *sub judice*, as in the cases cited in the foregoing paragraph, the prosecutor made an offer of mercy to appellant. When he refused the offer, he was tried on the enhanced indictment. It was the appellant who placed himself in jeopardy of the life sentence. As the district court observed, to hold otherwise would mean that in all cases involving a previously convicted defendant, the state would be required to seek the maximum penalty and never could engage in plea

bargaining. Such a ruling would be contrary to the doctrine that plea bargaining is an essential procedure in the administration of justice in the United States. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). We find no error in the judgment appealed from, which is hereby affirmed.

AFFIRMED.

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2636

ROBERT FLOYD MONTGOMERY

Petitioners-Appellant,

versus

W. J. ESTELLE, Director,
Texas Department of Corrections,

Respondent-Appellee

Appeal from the United States District Court for the
Northern District of Texas

Before GODBOLD, HILL AND FAY, Circuit Judges.

PER CURIAM:

The mandate of this court issued on April 14, 1977 is

hereby recalled. The opinion entered on February 25, 1977 and order denying rehearing entered on April 6, 1977 are vacated and withdrawn. The Clerk is instructed to schedule this case for oral argument as a Class III.